

LAM (Migration) [2021] AATA 2517 (12 July 2021)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr PAK HING LAM

CASE NUMBER: 1804258

HOME AFFAIRS REFERENCE(S): BCC2016/1352157

MEMBER: Russell Matheson

DATE: 12 July 2021

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl 820.211(2) of Schedule 2 to the Regulations; and
- cl 820.221(1)(a) of Schedule 2 to the Regulations.

Statement made on 12 July 2021 at 1:23pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – validly married – financial aspects of relationship – sponsor’s assets and accounts frozen because of imprisonment and parole for financial offences – limited household and social aspects – nature of commitment – relationship now 5 years’ duration – applicant’s emotional support for sponsor through legal proceedings – consistent, credible and persuasive evidence – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F(2), 65
Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 820.211(2), 820.221(1)(a)

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (the Act).
2. The applicant is a male national of China born in March 1966. He applied for the visa on 31 March 2016 based on his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211 because the delegate was not satisfied the applicant was the spouse of the sponsor. The applicant seeks review of the delegate's decision.
4. The applicant appeared before the Tribunal on 20 April 2021 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
5. The applicant was represented in relation to the review by his registered migration agent.
6. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
8. The Tribunal has before it the applicant's file from the Department of Home Affairs (the Department); its own file; and a copy of the Department's decision provided by the applicant to the Tribunal.
9. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record.

Whether the parties are in a spouse or de facto relationship

10. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
11. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion

about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

12. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate registered under the *Marriage Act 1961* indicating the applicant and sponsor were married at Hurstville in NSW, on 16 March 2016. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).
13. In forming an opinion as to whether they are in a marital relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together and not separately and apart on a permanent basis as defined in s.5F(2)(b)-(d), the Tribunal has had regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3).
14. After careful consideration of all the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
15. The Tribunal had the benefit of the applicant's and the sponsor's oral evidence at the hearing and found their evidence to be consistent and overall, credible. The Tribunal gave all the evidence provided by the parties at the Tribunal hearing and evidence provided by the applicant to the Department and the Tribunal file due regard. The applicant provided a limited amount of additional documentary and photographic evidence to the Tribunal.
16. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor during the hearing and the Tribunal is satisfied that the parties were genuine and credible witnesses.

Are the other requirements for a spouse relationship met?

17. Financial aspects

18. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, especially in relation to major financial commitments, whether any person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of daily household expenses.
19. The applicant provided a written submission and gave oral evidence that there was limited evidence of the financial aspects of the parties' relationship due to the fact the sponsor was incarcerated from December 2016 to April 2020 and is currently on parole until December 2021. He further stated that his wife was prosecuted for money laundering and her bank accounts and assets were frozen and it was impossible to establish a joint account or own joint property. The applicant stated that while the sponsor was imprisoned, he regularly

deposited the maximum amount of money allowed (\$100) into her prison account to be utilised for her personal needs. The applicant provided numerous receipts showing this occurring. The parties provided an ANZ bank statement of operating a joint account for the period 14 April 2020 to 25 May 2020 indicating the account was used for day-to-day living expenses and that two debit cards, #4017 and #4025 were linked to the account. The account also showed the sponsor's Centrelink payments being deposited into the joint account. The applicant stated that he operated his own personal Commonwealth Bank Australia (CBA) account and that his workers' compensation payments were deposited into the account but ceased on 1 April 2021. The parties gave evidence that they shared the day-to-day expenses utilising both bank accounts, and they pay the applicant's nephew \$200 a week rent. The sponsor gave evidence that the ANZ closed her account because of her money laundering activities and she opened a new account with the Bank of Queensland (BOQ) with the assistance of her daughter, and her Centrelink payments are deposited into that account. The sponsor stated that she questioned the ANZ bank and asked her parole officer to query why the ANZ cancelled the joint account and was given no answer other than it came from management. The parties stated that they are currently living off the applicant's limited savings in his CBA account and the sponsor's Centrelink payments made into her BOQ account. The parties stated that they have limited financial resources and that they share the daily living expenses. The parties stated that the applicant is currently involved in a lawsuit with his former employer and insurer and they are anticipating a financial payout due to the injuries he sustained in the workplace. The Tribunal accepts that the sponsor's criminal record would have a severe impact on the parties' ability to establish the financial aspects of their relationship whilst she was incarcerated and post release.

20. The parties had a sound knowledge and presented reasonably detailed and consistent evidence of their financial affairs, including individual income, bank accounts, daily living expenses, payment of personal bills, and future financial plans and commitments.
21. The parties gave consistent evidence in relation to the financial aspects of the relationship. The parties' evidence is that they have no joint liabilities, no major assets such as property together and limited savings in their individual accounts. There is limited evidence before the Tribunal of pooling or sharing of financial resources or any ongoing financial obligations.
22. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other. The Tribunal accepts that the parties are prepared to share their financial resources and any ongoing or future financial responsibilities.
23. The Tribunal places limited weight on this aspect of the relationship.

24. *Nature of the household*

25. The Tribunal has considered the nature of the household, including any joint responsibility for the care and support of children, the living arrangements and daily routine of the parties and the sharing of the responsibility for housework, to form an opinion as to whether the parties are living together and not living separately and apart on a permanent basis.
26. The applicant and sponsor in their written submissions and oral evidence gave detailed and consistent evidence about their living arrangements and the Tribunal found them persuasive, genuine and credible. The Tribunal is satisfied that the parties live together. The parties provided evidence of sharing the household duties and responsibilities and individual tasks in detail although the applicant's contribution is limited due to a work-place injury. They have provided consistent evidence of their living arrangements and details about their daily lives, employment and medical history. The parties provided limited documentary evidence in individual and joint names indicating that they have lived together for a significant period at their current address and previous addresses due to the fact the sponsor had been

incarcerated from December 2016 to April 2020 and they had only lived together for approximately nine months prior to that. The parties are currently living with the applicant's nephew in Guilford NSW and provided correspondence addressed to them individually and jointly at their current address. The applicant provided a visitor details report from the NSW Department of Corrective Services as evidence of visiting the sponsor in prison between 2016 and 2019.

27. The sponsor provided oral evidence and a written submission that since she has been released from prison the parties have lived happily together, staying with each other day and night, taking care and caring for each other. As a sequela of a work-related injury, her husband cannot hold kitchen utensils in his hands, so she is responsible for cooking and other household chores. The applicant is responsible for light cleaning. She further stated that her parole officer visited their residential address and consulted with the applicant as her husband about their living arrangements and conditions before she was released from prison on parole.
28. The Tribunal accepts that the parties live together, and they have established a joint household and share the responsibility of the housework. There are no children from the relationship.

29. ***Social aspects***

30. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinions of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
31. The applicant provided oral evidence and a written submission stating that there was limited evidence of the parties' social activities with the application due to the fact they socialised with a select group of people as the applicant was new to Australia and not long into their relationship the sponsor was imprisoned. He further stated that before she was imprisoned, she was on bail and waiting for a court date and this was a dark period for both of them and they had little contact with other people due to the embarrassment of the criminal charges laid against the sponsor.
32. The parties gave evidence that they have represented themselves to family and friends as being in a spousal relationship. The parties provided additional photographic evidence to the Tribunal of their social activities and special events that are captioned and dated from 2019 to the present in different social settings with family and friends and when the sponsor was on weekend release from jail. The Tribunal found their oral and photographic evidence persuasive. The Tribunal accepts that the two third-party form 888 statements from the sponsor's daughter and the applicant's nephew attest to the genuineness of the relationship, but they provide limited knowledge of the inception and development of the parties' relationship over a lengthy period. The Tribunal places little weight on the statements as convincing evidence as to the genuineness or nature of the relationship. The Tribunal accepts that the parties' relationship is recognised and supported by both their families.
33. The Tribunal accepts that the relationship is socially recognised by family and a select group of friends and they represent themselves to other people as being married to each other. The Tribunal accepts that the parties plan and undertake joint social activities together. There are statements from third parties, who are close family members, who express their view that the relationship is a genuine one. The Tribunal places limited weight on the social aspects of the relationship.

34.

35. **Commitment**

36. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length of time the parties have lived together, the degree of companionship and emotional support they provide each other and whether the parties view the relationship as a long-term one.
37. The parties claim to have been introduced to each other by the applicant's nephew in January 2016 and married in March 2016. The applicant provided a copy of the marriage certificate registered under the *Marriage Act 1961* indicating the applicant and sponsor were married at Hurstville in NSW, on 16 March 2016. The Tribunal accepts that the parties are lawfully married and have been in a relationship for over five years.
38. The applicant gave evidence that when the parties first met, they were both 50-year-old middle-aged people who had experienced a failed marriage. They were two lonely people who were always together, caring for and supporting each other and when the sponsor was on bail, waiting for the court hearing her activities were subject to the bail conditions and he was constantly supporting and comforting her. He further stated that the sponsor whilst waiting for her trial provided emotional support, care and comfort to him when he visited his mother in China to accompany her through the last journey of her life.
39. The parties stated that due to their age, they hope to be each other's last safe harbour and the last companion for each other till the last day of their lives. They have both made a contribution to all aspects of their life together. Additionally, they have a plan that when the COVID-19 pandemic is over and the border restrictions are lifted, they will travel to worship the applicant's parents and visit the sponsors mother in China when the sponsor's parole period ends.
40. The applicant provided a visitor details report from the NSW Department of Corrective Services as evidence of visiting the sponsor in prison between 2016 and 2019 and depositing money into her prison account to pay for her basic personal consumption in the prison.
41. The sponsor gave evidence of being traumatised as a result of being imprisoned and that after her release from prison, she was treated by a psychologist for a period of time, and the applicant provided her with emotional support, care and companionship at this time. The applicant stated when the sponsor was released from prison not only did he want to support the sponsor financially, more importantly he wanted to provide spiritual support to her so she could have the confidence to transform and reshape herself to enjoy life together.
42. The parties described the immense commitment and empathy they have for each other and described how they have worked together to face and address any problems they have had. They provided strong evidence of caring and supporting each other during highly emotional times of the sponsor's imprisonment and they also expressed their love of each other. They stated that they provide comfort, and emotional and physical support to each other in all aspects of their lives.
43. The parties detailed information of the intimacy, care, comfort and support they provide to each other. The sponsor provided detailed information regarding the applicant's health issues, past injuries and surgery and the high degree of support and care she provides to the applicant.
44. The Tribunal is satisfied that the parties see their relationship as a stable, mutually supportive and long-term one. The Tribunal considers their evidence regarding their commitment to each other to be plausible, persuasive and genuine.

45. The Tribunal notes that the applicant and the sponsor were able to articulate the reasons for their decision to form a relationship and spoke of their common interests, expectations and future together.
46. The Tribunal is satisfied the parties provide each other with a strong degree of companionship and emotional support that is commensurate with a couple having a commitment to a shared life together. The Tribunal is satisfied the couple view their relationship as a long-term one.

47. **Findings**

48. The Tribunal is satisfied, having had regard to the totality of the circumstances and the evidence provided at the hearing, that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied they live together and not separately and apart on a permanent basis. Having considered all the evidence and the circumstances of the relationship as detailed above, the Tribunal is satisfied the parties were in a spousal relationship at the time of application.
49. The Tribunal is satisfied that the sponsor is not prohibited from being a sponsoring partner and continues to sponsor the applicant. The Tribunal is satisfied that the sponsor, at the time of the visa application and decision, was an Australian citizen who had turned 18.
50. The applicant's movement records provide evidence of her having been the holder of a Visitor (Subclass 600) visa at the time of application, which was valid until 1 April 2016. He held this substantive visa upon applying for the Partner (Temporary) (Class UK) Subclass 820 visa on 30 March 2016. As the applicant held a substantive visa at the time of application, further requirements in cl.820.211(2)(d) need not be met.
51. Based on the above the Tribunal is satisfied that the requirements of s.5F(2)(b)-(d) of the Act were met at the time the visa application was made and are met at the time of this decision.
52. Therefore, the applicant meets cl.820.211(2) and cl.820.221(1)(a).
53. Given the findings above, the appropriate course is to remit the visa application to the Minister to consider the remaining criteria for a Subclass 820 visa.

54. **DECISION**

55. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211(2) of Schedule 2 to the Regulations; and
 - cl.820.221(1)(a) of Schedule 2 to the Regulations.

Russell Matheson
Member

56.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).